ASYLUM, WITHHOLDING and the CONVENTION AGAINST TORTURE

THE CONTEXT

The heart of United States asylum law is the protection of refugees fleeing persecution. This court has recognized that independent judicial review is critical in this "area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman v. INS*, 98 F.3d 416, 439 (9th Cir. 1996) (Kozinski, J., concurring).

In order to be eligible for protection, an applicant must show that she is a person who is unable or unwilling to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1064 (9th Cir. 2003) (citing 8 U.S.C. § 1101(a)(42)(A)).

I. ASYLUM LAW

A. Persecution

The term "persecution" is not defined by the Immigration and Nationality Act. The Ninth Circuit has defined persecution as "the infliction of suffering or harm upon those who differ [] in a way regarded as offensive." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc). Persecution covers a range of acts and harms. *See* Forms of Persecution, below. The "inquiry is unique and depends to a great extent on the facts of the particular case." *Li v. Ashcroft*, 312 F.3d 1094, 1101 (9th Cir. 2002), *reh'g en banc granted*, (9th Cir. July 7, 2003). Minor disadvantages or trivial inconveniences do not rise to the level of persecution. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

The cumulative effect of harms and abuses, which when considered individually may not rise to the level of persecution, may support a claim for asylum. *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where applicant witnessed violent attacks, and suffered extortion,

harassment, and threats); *see also Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (cumulative effect of severe harassment, threats, violence and discrimination against Israeli Arab and his family amounted to persecution); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (holding that harassment, wiretapping, staged car crashes, detention, and interrogation constituted persecution); *Popova v. INS*, 273 F.3d 1251 (9th Cir. 2001) (applicant was harassed, fired, interrogated, threatened, assaulted and arrested); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996).

A subjective intent to harm or punish an applicant is not required for a finding of persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (reversing BIA's determination that lesbian applicant could not establish that she was persecuted because the government was attempting to "cure," rather than punish, her). Moreover, harm can constitute persecution even if the persecutor had an "entirely rational and strategic purpose behind it." *Montecino v. INS*, 915 F.2d 518 (9th Cir. 1990).

1. Forms of Persecution

a. Physical Violence

Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. *See e.g.*, *Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (kidnapped and wounded by guerrillas, husband and brother killed); *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001) (kidnapped, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (arrested and tortured, including electric shocks); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (assaulted in front of family, held captive for a week, beaten unconscious); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (arrested, tortured and scarred); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (beaten and raped at gunpoint); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (beaten repeatedly, falsely accused of rape); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (raped and sexually assaulted); *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) (repeatedly attacked and robbed, forced to leave home); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161-62 (9th Cir. 1999) (suffered repeated beatings and severe verbal harassment in the military); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (jailed, beaten, suffered sadistic and

degrading treatment); *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996) (raped, abused, deprived of food, subjected to forced labor); *Singh v. Ilchert*, 69 F.3d 375 (9th Cir. 1995) (arrested, detained and tortured); *Singh v. Moschorak*, 53 F.3d 1031, 1032-34 (9th Cir. 1995) (arrested and tortured).

But see Hoxha v. Ashcroft, 319 F.3d 1179, 1182 (9th Cir. 2003) (harassment, threats, and one beating not persecution); *Li v. Ashcroft*, 312 F.3d 1094, 1101 (9th Cir. 2002) (forced pregnancy examination did not compel finding of past persecution), *reh'g en banc granted*, (9th Cir. July 7, 2003); *Prasad v. INS*, 47 F.3d 336, 339-40 (9th Cir. 1995) (minor abuse during brief detention did not compel finding of past persecution).

b. Threats

Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution. *See Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination against Israeli Arab and his family amounted to persecution); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002) (multiple death threats at home and business, "closely confronted" and actively chased); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074-75 (death threats, harm to family, and murders of his counterparts constituted past persecution), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (harassment, including threats, intimidation, and thefts); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (husband killed, applicant and family threatened); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) ("we have consistently held that death threats alone can constitute persecution;" threatened, shot at, family members killed, mother beaten); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir. 1999) (multiple death threats constituted past persecution); *Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999) (harassed, detained and threatened); *Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999) (two death threats, cousins killed); *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998) (if credible, three death threat letters would appear to constitute past persecution); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (breaking into applicant's home, beating his father, and making threats to the applicant would constitute persecution); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (death threats, including marking her

house, taking her ration card, and harassment of family constitute past persecution).

But see Mendez-Gutierrez v. Ashcroft, No. 02-70546, 2003 WL 21976473, *5 n.6 (9th Cir. Aug. 20, 2003) ("unspecified threats" not "sufficiently menacing to constitute past persecution"); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats "constitute harassment rather than persecution"); *Lim v. INS*, 224 F.3d 929, 936-37 (9th Cir. 2000) (mail and telephone threats, without more, do not compel a finding of past persecution); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (no well-founded fear based on anonymous threat).

c. Detention

Involuntary civil confinement may constitute persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (suggesting that forced institutionalization could amount to persecution).

But see Al-Saher v. INS, 268 F.3d 1143, 1146 (9th Cir. 2001) (five to six day detention, without abuse or threats, did not amount to persecution); *Khourassany v. INS*, 208 F.3d 1096, 1100-01 (9th Cir. 2000) (short detentions did not constitute persecution); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996 (en banc) (brief detention and searches did not constitute persecution); *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (four-day detention, without more, did not rise to the level of persecution).

d. Mental, Emotional, and Psychological Harm

Physical harm is not required for a finding of persecution. *See Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969) (holding that persecution encompasses both physical and mental suffering); *see also Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (arrest of a family member at church could constitute persecution); *Khassai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (per curiam) (Reinhardt, J., concurring) ("[W]hen a young girl loses her father, mother and brother--sees her family effectively destroyed--she plainly suffers severe emotional and developmental injury.").

e. Economic Sanctions and Deprivations

Substantial economic deprivation, which constitutes a threat to life or freedom, can constitute persecution. *See e.g., Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination made it virtually impossible for applicant to earn a living); *Surita v. INS*, 95 F.3d 814 (1996) (applicant suffered multiple robberies, house was looted by soldiers, threatened); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (threats, violence against family, and seizure of family land, ration card, and ability to buy business inventory); *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (considering impact of extortion on ability to earn livelihood); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (holding that seizure of land and livelihood could contribute to a finding of persecution)*; Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) ("[P]ersecution may encompass a deliberate imposition of substantial economic disadvantage.").

But see Nagoulko v. INS, 333 F.3d 1012 (9th Cir. 2003) (being fired from job did not rise to level of persecution); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (forced closing of applicant's restaurant, when he continued to operate other businesses, did not constitute persecution); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1984) (denial of food discounts and special work permit did not amount to persecution).

f. Discrimination and Harassment

Severe and pervasive discriminatory measures can amount to persecution. *See Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that the BIA has held that severe and pervasive discrimination can constitute persecution in "extraordinary cases"). Lesser forms of discrimination are relevant to an asylum claim, but are generally not sufficient to make a finding of persecution. *See Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) ("Proof that the government or other persecutor has discriminated against a group to which the petition belongs is, accordingly, *always* relevant to an asylum claim."); *see also Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (discrimination, harassment and violence can constitute persecution); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996) (finding persecution where applicant was branded as a traitor, harassed, threatened, home

vandalized and relative imprisoned); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (discrimination, harassment and violence can constitute persecution).

Cf. Nagoulko v. INS, 333 F.3d 1012 (9th Cir. 2003) (record does not compel finding that applicant who was "teased, bothered, discriminated against and harassed" suffered from past persecution); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (harassment, inability to get a job, and violence against friend did not rise to level of past persecution, but did support a well-founded fear); *Singh v. INS*, 134 F.3d 962, 969 (9th Cir. 1998) (repeated vandalism, with no physical injury, or threat of injury, not persecution); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996 (en banc) (noting that persecution "does not include mere discrimination, as offensive as it may be.").

B. Source or Agent of Persecution

In order to qualify for asylum, the source of the persecution must be the government, a quasi-official group, or persons or groups that the governent is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). The fact that financial considerations may account for the state's inability to stop the persecution is not relevant. *Id*. at 1198.

1. Examples Discussing Agent of Persecution

Rodas-Mendoza v. INS, 246 F.3d 1237 (9th Cir. 2001) (fear of violence from cousin not sufficient); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by government official where government never prosecuted the perpetrator); *Ladha v. INS*, 215 F.3d 889, 902 (9th Cir. 2000) (government unable to control violence by non-state actors); *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1999); *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc) (non-state actors); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (ultra-nationalist group); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (government encouraged discrimination, harassment and violence); *Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (persecution by a government-sponsored group); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996) (fear of former National Guard members); *Ghaly v. INS*, 58 F.3d 1425

(denying asylum because feared harm was not "condoned by the state nor the prevailing social norm"); *Desir v. Ilchert*, 840 F.2d 723, 724 (9th Cir. 1988) (persecution by quasi-official security force); *Arteaga v. INS*, 836 F.2d 1227, 1231 (1988) (guerrilla movement); *Lazo-Majano v. INS*, 813 F.2d 1432, (9th Cir. 1987) (sergeant in the army), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996 (en banc).

C. Well-Founded Fear of Persecution

In order to qualify for asylum, an applicant must show that his or her fear of persecution is well founded. A well-founded fear must be subjectively genuine and objectively reasonable. *See Montecino v. INS*, 915 F.2d 518, 521 (9th Cir. 1990) (noting the importance of the applicant's subjective state of mind). "A "'well-founded fear' . . . can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Caradoza-Fonseca*, 480 U.S. 421, 448 (1987).

1. Subjective Prong

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm. *See Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995). "[F]ortitude in face of danger" does not denote an "absence of fear." *Id.; cf. Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1996) (finding no subjective fear where applicant's testimony was not credible); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1257-58 (9th Cir. 1992) (same).

A fear of persecution need not be the applicant's only reason for leaving his country of origin. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir. 1985) (holding that mixed motives for departure, including economic motives, does not bar asylum claim).

2. Objective Prong

The objective prong of the well-founded fear test requires "credible, direct, and specific evidence in the record that would support a reasonable fear of persecution." *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998)

(internal citation and punctuation omitted). "[E]ven a ten percent chance of persecution may establish a well-founded fear." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). This court has stated that objective circumstances "must be determined in the political, social and cultural milieu of the place where the petitioner lived." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

A claim based solely on general civil strife or widespread random violence is not sufficient. *See e.g.*, *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986). However, the existence of general civil unrest does not preclude asylum eligibility. *See Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003).

3. Past Persecution Not Required

A showing of past persecution is not required to qualify for asylum. *See Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."); *Mendez-Gutierrez v. Ashcroft*, No. 02-70546, 2003 WL 21976473 (9th Cir. Aug. 20, 2003). However the past persecution of an applicant creates a rebuttable presumption that he will be persecuted in the future. *See* discussion of past persecution, below. Past harm not amounting to persecution is relevant to a determination of the well-foundedness of an applicant's fear of future persecution. *See Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (harassment and inability to get a job not past persecution, but relevant to establishing a well-founded fear).

4. Demonstrating a Well-Founded Fear

An applicant's fear must generally be based on an individualized, rather than generalized, risk of persecution. *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003). However, if the applicant is a member of a mistreated group, the level of individualized targeting that she must show is inversely related to the degree of persecution directed toward that group generally. *Id*. at 1182-83.

a. Targeted for Persecution

One way for an applicant to demonstrate a well-founded fear is to show that he has been targeted for persecution. *See e.g., Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000) (applicant was followed, appeared on a death list; several colleagues were killed); *Mendoza Perez v. INS*, 902 F.2d 760, 762 (9th Cir. 1990) (threatened by death squad).

b. Pattern and Practice of Persecution

An applicant is not required to show that she will be singled out individually for persecution if she can show a pattern or practice of persecution of similarly situated people. *See Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Osorio v. INS*, 18 F.3d 1017, 1031-32 (9th Cir. 1994) (pattern and practice of persecution of union leaders in Guatemala). "[T]his 'group' of similarly situated persons is not necessarily the same as the more limited 'social group' category mentioned in the asylum statute." *Mgoian*, 184 F.3d at 1036.

c. Membership in Disfavored Group

A member of a "disfavored group" that is not subject to a pattern or practice of persecution may also demonstrate a well-founded fear. *See Kotasz v. INS*, 31 F.3d 847, 853-54 (9th Cir. 1994) (disfavored group of active opponents of the Communist Regime in Hungary). "[T]his court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien's individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution)." *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). "The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be." *Id; see also Hoxha v. Ashcroft*, 319 F.3d 1179, 1182-83 (9th Cir. 2003); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (Indo-Fijians).

d. Family Ties

Acts of violence against an applicant's family members and friends may establish a well-founded fear of persecution. *See Korablina*, 158 F.3d 1039, 1044 (9th Cir. 1998). However, the violence must "create a pattern of persecution closely tied to the petitioner." *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991). "[T]he death of one family member does not automatically trigger a sweeping entitlement to asylum eligibility for all members of her extended family. Rather, when evidence regarding a family history of persecution is considered, the relationship that exists between the persecution of family members and the circumstances of the applicant must be examined." *Navas v. INS*, 217 F.3d 646, 659 n.18 (9th Cir. 2000) (internal quotations, punctuation and citations omitted); *see also Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999) (violence and harassment against entire family); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (member of a large historically politically active family).

5. Countrywide Persecution

"The ability of an applicant to relocate to a place of safety within his country of origin may . . . be considered by the IJ in determining whether an applicant's fear is "'well-founded.'" *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003). "Specifically, the IJ may deny eligibility for asylum to an applicant who has otherwise demonstrated a well-founded fear of persecution where the evidence establishes that internal relocation is a reasonable option under all of the circumstances." *Id.* (remanding for a determination of the reasonableness of internal relocation). If the source of persecution is the government, a rebuttable presumption arises that the threat exists nationwide, and that internal relocation would be unreasonable. *Id.* at 1070; *see also Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (no need to demonstrate countrywide persecution if persecutor shows no intent to limit his persecution to one area, and applicant can be readily identified); *cf. Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (danger based on anonymous threat localized in a small geographic area).

Recently amended asylum regulations provide that the reasonableness of internal relocation should be based on considerations including, "whether the applicant would face other serious harm in the place of suggested

relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." *See* 8 C.F.R. § 1208.13(b)(3) (2002).

6. Continued Presence of Applicant

An applicant's continued presence in her country of persecution before flight, while relevant, does not necessarily undermine a well-founded fear. *See e.g., Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (post-threat harmless period did not undermine well-founded fear). There is no "rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded." *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (8-year stay after release from prison did not negate claim based on severe past persecution); *Turcios v. INS*, 821 F.2d 1396, 1401-02 (9th Cir. 1987) (remaining in country for several months after release from prison did not negate fear); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (two-year stay after release not determinative); *cf. Lata v. INS*, 204 F.3d 1241, 1245 (9th Cir. 2000) (applicant's fear undermined by two-year stay in country after incidents of harm)*; Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (asylum denied where applicant remained over five years after interrogation without further harm or contacts from authorities).

7. Continued Presence of Family

The continued presence of family members in the country of origin does not necessarily rebut an applicant's well-founded fear, unless there is evidence that the family was similarly situated or subject to similar risk. *See Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000); *cf. Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) ("An applicant's claim of persecution upon return is weakened, even undercut, when similarly-situated family members continue to live in the country without incident, . . . or when the applicant has returned to the country without incident." (internal quotation and citation omitted)); *Aruta v. INS*, 80 F.3d 1389, 1395 (9th Cir. 1996); *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (continued and unmolested presence of family undermined well-founded fear).

8. Cases Finding No Well-Founded Fear

Nagoulko v. INS, 333 F.3d 1012 (9th Cir. 2003) (possibility of future persecution too speculative); *Li v. Ashcroft*, 312 F.3d 1094, 1102 (9th Cir. 2002), *reh'g en banc granted*, (9th Cir. July 7, 2003); *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); *Acewicz v. INS*, 984 F.2d 1056, 1060-61 (9th Cir. 1993) (based on changed political conditions in Poland); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (where potential persecutor was dead).

D. Past Persecution

"In order to establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling to control." *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000).

1. Presumption of a Well-Founded Fear

Once an applicant establishes past persecution, a presumption arises that he or she has a well-founded fear of future persecution. *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001); *Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995) ("[O]nce an applicant has demonstrated that he suffered past persecution, there is a presumption that he faces a similar threat on return.").

Past persecution need not be atrocious to give rise to the presumption. *See Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (holding that past persecution was not atrocious, but did give rise to a presumption of a well-founded fear). According to the 2002 asylum regulations, the presumption raised by a finding of past persecution applies only to a future fear based on the original claim, and not to a fear of persecution from a new source. *See* 8 C.F.R. § 1208.13(b)(1) (2002).

2. Rebutting the Presumption of a Well-Founded Fear

a. Fundamental Change in Circumstances

Under the current version of 8 C.F.R. § 1208.13(b)(1)(i)(A), in order to rebut the presumption of a well-founded fear, the agency must show by a preponderance of the evidence that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear." *Baballah v. Ashcroft*, 335 F.3d 981, 992 (9th Cir. 2003); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002); *Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002).

b. Changed Country Conditions

Under the previous version of the regulation, formerly codified at 8 C.F.R. § 208.13(b)(1), the INS bore "the burden to demonstrate by a preponderance of the evidence that country conditions [had] changed sufficiently." *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000). In order to meet this burden, the agency "is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution." *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation omitted). "Information about general changes in the country is not sufficient." *Garrovillas v. INS,* 156 F.3d 1010, 1017 (9th Cir. 1998).

(1) State Department Report

"[A] State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution." *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002). However, an individualized State Department report may be sufficient to rebut a well-founded fear. *See Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998) (Romania); *see also Molina-Estrada*, 293 F.3d at 1096 (noting that if no past persecution is established, the "IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report"); *but see Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003) (holding that the INS rebutted the presumption based on a 1997 Guatemala country report, which

was considered by the Supreme Court in *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)).

(2) Administrative Notice of Changed Country Conditions

The BIA may not take administrative notice of changed conditions in the applicant's country of feared persecution without giving the applicant notice of its intent to do so, and an opportunity to show cause why such notice should not be taken, or to present additional evidence. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1026-31 (9th Cir. 1992) (holding that the denial of pre-decisional notice violates due process, and showed a failure to make an individualized assessment of the applicant's claims); *see also Getachew v. INS*, 25 F.3d 841 (9th Cir. 1994) (holding that INS brief does not provide adequate notice); *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994); *Gomez-Vigil v. INS*, 990 F.2d 1111 (9th Cir. 1993) (per curiam).

If administrative notice regarding changed country conditions is taken by the immigration judge during proceedings, there is no violation of due process because the applicant had an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995); *Acewicz v. INS*, 984 F.2d 1056, 1060-61 (9th Cir. 1993) (finding that applicants "had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well founded"); *Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994 (applicants were given ample opportunity to discuss changes in Hungary).

This court may take judicial notice of recent events that occurred after the BIA's decision. *See Gafoor v. INS*, 231 F.3d 645, 655-56 (9th Cir. 2000) (taking judicial notice of recent events in Fiji, and noting that the INS will have an opportunity to challenge the significance of the evidence on remand). However, the court of appeals may not determine the issue of changed country conditions in the first instance. *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003).

c. Cases Finding that the INS Failed to Rebut Presumption Based on Changed Circumstances or Conditions

Baballah v. Ashcroft, 335 F.3d 981 (9th Cir. 2003) (Israel); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161-62 (9th Cir. 2002); *Rios v. Ashcroft*, 287 F.3d 895, 901-02 (9th Cir. 2002) (Guatemala); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076-77, *as amended by* 290 F.3d 964 (9th Cir. 2002) (Peru); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (Romania); *Popova v. INS*, 273 F.3d 1251, 1259-60 (9th Cir. 2001) (Bulgaria); *Lal v. INS*, 255 F.3d 998, 1010-11 (9th Cir. 2001) (Fiji) *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Agbuya v. INS*, 241 F.3d 1224, 1230-31 (9th Cir. 2001) (past persecution by NPA in the Philippines); *Kataria v. INS*, 232 F.3d 1107, 1115-16 (9th Cir. 2000) (State Department report stating that arrests and killings had declined significantly in India not sufficient); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of religious minority in Iran); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexian police); *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Chanchavac v. INS*, 207 F.3d 584, 592 (9th Cir. 2000) (Guatemala); *Tarubac v. INS*, 182 F.3d 1114, 1119-20 (9th Cir. 1999) (State Department mixed assessment of human rights conditions in the Philippines insufficient); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) (Guatemala); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (Philippines); *Leiva-Montalvo v. INS*, 173 F.3d 749, 751 (9th Cir. 1999) (El Salvador); *Meza-Manay v. INS*, 139 F.3d 759, 765-66 (9th Cir. 1998) (Peru); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996) (Nicaragua); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (Fiji); *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (India).

d. Internal Relocation

"[B]ecause a presumption of well-founded fear arises upon a showing of past persecution, the burden is on the INS to demonstrate by a preponderance of the evidence, once such a showing is made, that the applicant can reasonably relocate internally to an area of safety." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003). Where the persecutor is the government, "[i]t has never been thought that there are safe places within a nation" for the applicant to return. *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995); *but see* 8 C.F.R. § 1208.13(b)(3)(ii) ("In cases in which the

persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate."); *see also Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002) (discussing reasonableness in light of threats).

3. Compelling Cases of Past Persecution

In cases of severe past persecution, an applicant may obtain asylum even if he has no well-founded fear in the future, provided that he or she has "compelling reasons" for being unwilling to return. *See Lal v. INS*, 255 F.3d 998, *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Vongsakdy v. INS*, 171 F.3d 1203, 1206-07 (9th Cir. 1999); *Lopez-Galarza v. INS*, 99 F.3d 954, 960-63 (9th Cir. 1996) (extreme physical abuse, including rape); *Rodriguez Matamoros v. INS*, 86 F.3d 158, 160-61 (9th Cir. 1996) (remanding for determination); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); 8 C.F.R. § 1208.13(b)(1)(iii).

a. Insufficiently Severe Past Persecution

Rodas-Mendoza v. INS, 246 F.3d 1237, 1240 (9th Cir. 2001); *Belayneh v. INS*, 213 F.3d 1488 (9th Cir. 2000); *Kumar v. INS*, 204 F.3d 931 (9th Cir. 2000) (past harm not severe enough to constitute atrocious persecution to override changed country conditions); *Marcu v. INS*, 147 F.3d 1078, 1082-83 (9th Cir. 1998); *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996); *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (past harm not sufficiently severe)

E. Nexus to the Five Grounds

The past persecution or anticipated persecution must be "on account of" one of the five grounds enumerated in the statue: race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir. 1997). The applicant must provide some direct or circumstantial evidence that the persecutor was or would be motivated to persecute him because of a protected status. *Sangha*, 103 F.3d at 1486-87.

1. Proving a Nexus

Direct proof of motivation may consist of statements made by the persecutor to the victim, or by victim to persecutor. *See e.g., Gonzalez-Neyra v. INS*, 22 F.3d 1293, 1295 (9th Cir. 1997) (applicant told persecutor that he would not submit to extortion because of opposition), *amended by* 133 F.3d 726 (9th Cir. 1998). An applicant's credible testimony as to the persecutor's motivations may be sufficient to establish nexus. *See Shoafera v. INS*, 228 F.3d 1070, 1074-75 (9th Cir. 2000) (applicant established through her credible testimony and witness testimony that the perpetrator was motivated to rape her based, in part, on her ethnicity).

Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies. *See e.g., Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure). "In some cases, the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion, or one of the other protected grounds. Indeed, this court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue." *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (internal citation omitted); *see also Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) ("[I]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political.") (internal quotations omitted); *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir. 1997).

2. Race

Claims of race and nationality persecution often overlap. *See Duarte de Guinac*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999). Recent cases use the more precise term of "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality." *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotations omitted); *see also Baballah v. Ashcroft*, 335 F.3d 981 n.10 (9th Cir. 2003).

a. Cases Discussing Racial or Ethnic Persecution

Melkonian v. Ashcroft, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645, 651-52 (9th Cir. 2000) (Indo-Fijian persecuted on account of race and imputed political opinion); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape motivated in part by Amharic ethnicity); *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) (Kanjobal Indian from Guatemala failed to establish asylum eligibility on basis of race); *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (well-founded fear of persecution on the basis of Armenian ethnicity); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (past persecution of Quiche Indian from Guatemala); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) (past persecution of Indo-Fijian); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese Filipino failed to establish a well-founded fear on account of race or ethnicity).

3. Religion

Persecution on the basis of religion may assume various forms. *See* examples below:

a. Cases Finding Eligibility on the Basis of Religion

Baballah v. Ashcroft, 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination against Israeli Arab); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his ethnicity and religion); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (harassment and threats based on applicant's religious surname and political opinion); *Lal v. INS*, 255 F.3d 998, 1010-11 (9th Cir. 2001) (religious and political persecution), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of Christian who attempted interfaith dating in Iran); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (if credible, past persecution of Shia Muslims by Sunni Muslims in Pakistan); *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000) (persecution on basis of interfaith marriage); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (past persecution of Jewish citizen of the

Ukraine); *Li v. INS*, 92 F.3d 985 (9th Cir. 1996) (arrest of family member at church may provide basis for eligibility); *Hartooni v. INS*, 21 F.3d 336, 341 (9th Cir. 1994) (if credible, Christian Armenian in Iran eligible for asylum).

b. Cases Finding no Religious Persecution

Nagoulko v. INS, 333 F.3d 1012 (9th Cir. 2003) (past harassment of Christian in Ukraine not persecution, future fear too speculative); *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001) (Ahmadi in Pakistan); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000) (past torture had no nexus to applicant's religious beliefs); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (conscription of Jehovah's Witness); *Abedini v. INS*, 971 F.2d 188, 191-92 (9th Cir. 1992); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc); *Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995) (prejudice and discrimination against Egyptian Coptic Christian); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1990) (religious converts in Egypt).

4. Nationality

See cases cited under race, above; *see also Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000) (Armenian from Nagorno-Karabakh had no well-founded fear); *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999) (persecution of Armenian in Azerbaijan).

5. Social Group

"[A] 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that gay men with female sexual identities in Mexico constitute a particular social group). This court has also stated that a particular social group "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (noting that a family is a "prototypical" example of a social group, but young working class urban males of military age are not).

The Ninth Circuit has held that large, internally diverse, demographic groups would rarely constitute distinct social groups. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) ("Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status.").

a. Types of Social Groups

(1) Family and Clans

This court has "recognized that, in some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes." *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576 (9th Cir. 1986) (noting that a family is a "prototypical" example of a social group); *but see Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (rejecting family membership claim where distant relatives were harmed, but closer relatives were not).

(2) Gender Claims

The Ninth Circuit has not yet decided whether the persecution of women could constitute persecution on accout of membership in a particular social group. *See Fisher v. INS*, 79 F.3d 955, 965-66 (9th Cir. 1996) (en banc) (Canby, J., concurring). The BIA has recognized gender-defined groups as social groups. *See In re Kasinga*, Interim Dec. 3278 (BIA 1996) (granting asylum based on a gender-defined social group of "young women of the Tchamba-Kunsuntu Tribe, who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice").

(3) Sexual Orientation

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000) (holding that gay men with female sexual identities in Mexico constitute a particular social group).

(4) Former Status

An applicant's status based on her former occupations, associations, or shared experiences could be the basis for a claim based on social group. *See e.g., Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000). "Persons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA." *Id*. at 1029 (holding that current police or military are not a social group).

b. Cases Denying Social Group Claims

Molina-Estrada v. INS, 293 F.3d 1089, 1095 (9th Cir. 2002) (evidence did not compel a finding that applicant was persecuted on account of family membership); *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) (Kanjobal Indians comprising large percentage of population in a given area are not a particular social group); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (persons of low economic status in China not a particular social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (military not a social group); *Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (family); *De Valle v. INS*, 901 F.2d 787, 792-93 (9th Cir. 1990) (family members of military deserter).

6. Political Opinion

"[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted 'on account of' a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of* his political opinion." *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (internal citation omitted).

Political Opinion encompasses more than electoral politics or formal political ideology or action. *See e.g., Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that an applicant's statements regarding the unfair distribution of food resulted in the imputation of an anti-government political opinion); *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000)

("Refusal to accede to government corruption can constitute a political opinion for purposes of refugee status."); *Borja v. INS*, 175 F.3d 732 (9th Cir. 2000) (en banc) (refusal to pay revolutionary tax in the face of threats constitutes an expression of political belief). A political opinion can be an actual opinion held by the applicant, or an opinion imputed to him or her by the persecutor. *See Sangha v. INS*, 103 F.3d 1482, 1488-89 (9th Cir. 1997).

a. Organizational Membership

An applicant may manifest his or her political opinion by membership or participation in an organization with political purposes or goals. *See e.g., Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996); *Mendoza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990) (involvement with land reform organization); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985) (active member of anti-government political organization).

b. Refusal to Support Organization

An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same. *See e.g., Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (opposition to NPA); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (death threats and forced recruitment, where applicant did not agree with guerrillas); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to guerrilla movement), *amended by* 133 F.3d 726 (9th Cir. 1998); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996) (refusal to support Sandinistas); *Gonzalez v. INS*, 82 F.3d 903, 906 (9th Cir. 1996).

c. Labor Union Membership and Activities

Cases recognizing the political nature of trade union activity include: *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (political opinion includes views on government economic policies); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996); *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984).

d. Other Expressions of Political Opinion

An applicant's resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation. *See Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *see also Grava v. INS*, 205 F.3d 1177, 1181-82 (9th Cir. 2000) (whistle-blowing may be a political opinion); *Reyes-Guerrero v. INS*, 192 F.3d 1241 (9th Cir. 1999) (prosecuting members of another political party); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (applicant's belief that his government should not sell nuclear technology to Iran).

e. Neutrality

The Ninth Circuit recognizes that a conscious choice not to side with any political faction can be a manifestation of a political opinion. *See Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (recognizing the doctrine of hazardous neutrality, noting that *Elias-Zacarias* questioned, but did not overrule neutrality theory); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995) (desertion from military established neutrality). An applicant's neutrality must be result of an affirmative decision to remain neutral, rather than mere apathy. *See Lopez v. INS*, 775 F.2d 1015, 1016-17 (9th Cir. 1985).

(1) Cases Discussing Neutrality

Navas v. INS, 217 F.3d 646, 656 n.12 (9th Cir. 2000); *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000) (rejecting claim of neutrality); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413-14 (9th Cir. 1991) (rejecting claim); *Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990) (rejecting claim of neutrality); *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989) (applicant persecuted because of neutrality); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction."); *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

f. Opposition to Coercive Population Control Policies

Victims or those who fear being victims for resistance or opposition to coercive family planning policies shall be deemed to have been persecuted or

have a well-founded fear of persecution on account of political opinion. *See* 8 U.S.C. § 1101(a)(42)(B):

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

"The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility." *Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003) (holding that applicant who had two forced abortions and involuntary insertion of an intrauterine contraceptive device suffered past persecution). The INA also protects individuals who have been forcibly sterilized, as well as their spouses. *Id.*; *see also Li v. Ashcroft*, 312 F.3d 1094, 1101 (9th Cir. 2002), *reh'g en banc granted*, (9th Cir. July 7, 2003).

g. Imputed Political Opinion

"Imputed political opinion is still a valid basis for relief after Elias-Zacarias." *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); *see also Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). An imputed political opinion arises when "[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views." *Canas-Segovia*, 970 F.2d at 602. Under the imputed political opinion doctrine, the applicant's own opinions are irrelevant. *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). "[O]ur analysis focuses on how the persecutor perceived the applicant's actions and allegiances, and what motivated their abuse." *Agbuya v. INS*, 241 F.3d 1224, 1229-30 (9th Cir. 2001) (NPA perceived applicant to be an enemy of the laborers, the communist cause and the NPA itself).

An imputed political opinion claim may arise from the applicant's associations with others, including family, organizational, governmental or personal affiliations, which cause assumptions to be made about him. "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, the inference that they are connected and politically motivated is an appropriate one." *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (imputation of pro-guerrilla political opinion) (internal quotations omitted); *see also Lopez-Galaraza v. INS*, 99 F.3d 954 (9th Cir. 1996) (imputed opinion based on family's ties to former government); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995) (imputed beliefs of Sikh separatists); *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) (imputed opinion based on government employment); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (imputed opinion based on association with large, historically politically active family).

(1) Other Cases Discussing Imputed Political Opinion

Rios v. Ashcroft, 287 F.3d 895, 900-01 (9th Cir. 2002) (perceived to be political opponents of the guerrillas); *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001) (imputed political opinion based on evacuation from Iraq by United States); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (feared retaliation for testifying against guerrilla leaders); *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000); *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000) (military accused applicant of being a guerrilla when beating him); *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000) (guerrilla abductor told applicant that her teaching efforts undermined guerrilla recruitment efforts); *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (en banc) (military informant); *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (president of street vendor's cooperative); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (bodyguard to President's family); *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1998); *Rodriguez-Roman v. INS*, 98 F.3d 416, 429-30 (9th Cir. 1996) (illegal departure statue imputes disloyalty); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996); *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995); *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1029-30 (9th Cir. 1990) (based on friendship with guerrilla supporter) *overruled in part on other grounds by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997); *Maldonado-Cruz v. INS*, 883

F.2d 788, 792 (9th Cir. 1989) (supposed association with the guerrillas); *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (imputation based on false accusation); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (refusal to accede to extortion); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (deliberate and cynical misattribution of a political viewpoint) *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996 (en banc); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985).

7. Cases Finding no Nexus

Molina-Estrada v. INS, 293 F.3d 1089 (9th Cir. 2002) (no evidence to compel finding that guerrillas attacked applicant's family on account of imputed political opinion); *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001) (no nexus between rape by guerrillas and any protected ground); *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001) (rape and murder of aunt was personal dispute); *Cruz-Navarro v. INS*, 232 F.3d 1024 (9th Cir. 2000) (no evidence to show that guerrillas imputed contrary political opinion to police officer); *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Kozulin v. INS*, 218 F.3d 1112, 1115-17 (9th Cir. 2000); *Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000); *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000) (no nexus between bombing of applicant's home and her refusal to join guerrillas); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000) (past torture had no nexus to applicant's religious beliefs); *Sangha v. INS*, 103 F.3d 1482, 1489-91 (9th Cir. 1997); *Li v. INS*, 92 F.3d 985, 987-88 (9th Cir. 1996) (fear of punishment from unpaid smugglers); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc); *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (no imputed neutrality); *De Valle v. INS*, 901 F.2d 787, 791 (9th Cir. 1990) (rejecting claim of "doubly imputed" political opinion based on husband's desertion); *Zayas-Marini v. INS*, 785 F.2d 801, 806 (9th Cir. 1986); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984).

F. Mixed-motive Cases

A persecutor may have multiple motives for inflicting harm on an applicant. As long as the applicant produces evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in

part, by a protected ground, the applicant is eligible for asylum. *See e.g., Gafoor v. INS*, 231 F.3d 645, 652-54 (9th Cir. 2000) (race, political opinion, and personal vendetta); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by government official motivated in part by ethnicity); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000) ("revenge plus" motive of guerillas to harm former police officer who testified against the NPA); *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (at least one motive was the imputation of pro-guerrilla political opinion); *Tarubac v. INS*, 182 F.3d 1114, 1118-19 (9th Cir. 1999) (political opinion and economic motives); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (extortion plus political motives); *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998).

G. Prosecution

Ordinary prosecution for criminal activity is generally not persecution. *Chanco v. INS*, 82 F.3d 298 (9th Cir. 1996) (prosecution for involvement in military coup); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (prosecution for misappropriation of funds); *Fisher v. INS*, 79 F.3d 955, 961-62 (9th Cir. 1996) (en banc) (punishment for violation of dress and conduct rules); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (punishment for distribution of Western videos and films).

1. Pretextual Prosecution

However, if the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution. *See Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (violation of law against public displays of affection can be basis for asylum claim). "If there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person ... there arises a presumption that the motive for harassment is political." *Navas v. INS*, 217 F.3d 646, 660 (9th Cir. 2000) (internal quotations omitted); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture, even if conducted for intelligence gathering purposes, constitutes persecution); *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (illegal departure law); *Ramirez Rivas v. INS*, 899 F.2d 864, 867-68 (9th Cir. 1990); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (governmental harm without formal prosecutorial measures is persecution).

H. Illegal Departure Laws

"Criminal prosecution for illegal departure is generally not considered to be persecution." *Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996) (fine and three-week confinement upon return to China not persecution); *Kozulin v. INS*, 218 F.3d 1112, 1117-18 (9th Cir. 2000) (applicant failed to establish that illegal departure from Russia would result in disproportionately severe punishment).

However, an applicant may establish persecution where there is evidence that departure control laws provide severe or disproportionate punishment, or label violators as defectors, traitors, or enemies of the government. *See Al-Harbi v. INS*, 242 F.3d 882, 893-94 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Rodriguez-Roman v. INS*, 98 F.3d 416, 430-31 (9th Cir. 1996) (severe punishment for violation of Cuban illegal departure law which "imputes to those who are prosecuted pursuant to it, a political opinion"); *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969) (holding in Yugoslavian case that asylum law protects applicants who would be punished for violation of a "politically motivated prohibition against defection from a police state").

I. Military and Conscription Issues

1. Conscription Generally

Punishment for evading a country's military or conscription laws is generally not persecution. *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Ubau-Marenco v. INS*, 67 F.3d 750, 754 (9th Cir. 1995), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992); *Castillo v. INS*, 951 F.2d 1117 (9th Cir. 1991); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990); *Kaveh-Haghigy v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986) (per curiam); *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984).

2. Exceptions

However, the Ninth Circuit has recognized that forced conscription or punishment for violation of military service rules can constitute persecution in the following circumstances:

a. Disproportionately Severe Punishment

Where individual would suffer disproportionately severe punishment for evasion on account of one of the grounds. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 864 (9th Cir. 1995); *Barraza-Rivera v. INS*, 913 F.2d 1443, 1451 (9th Cir. 1990).

b. Inhuman Conduct

Where individual would be forced to engage in conduct that is condemned by the international community as contrary to basics rules of human conduct. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 863-64 (9th Cir. 1995) ("Both this court and the BIA have recognized conscientious objection to military service as grounds for relief from deportation, where the alien would be required to engage in inhuman conduct were he to continue serving in the military."); *Barraza-Rivera v. INS*, 913 F.2d 1443, 1450-52 (9th Cir. 1990) (no objection to military service per se, but fear of punishment for desertion given his refusal to assassinate two men); *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000) (prosecution for refusal to persecute Indo-Fijians).

c. Moral or Religious Grounds

Where an individual refuses to serve based on moral or religious beliefs. *Barraza-Rivera v. INS*, 913 F.2d 1443, 1450-51 (9th Cir. 1990).

3. Participation in Coup

"Prosecution for participation in a coup does not constitute persecution on account of political opinion when peaceful means of protest are available for which the alien would not face punishment." *Chanco v. INS*, 82 F.3d 298, 302 (9th Cir. 1996). The Ninth Circuit has not decided whether

punishment for a failed coup against a regime which prohibits peaceful protest or change could be eligible for asylum. *See id.*

4. Military Informers

An informer for the military in a conflict that is "political at its core" would be perceived as a political opponent by the group informed upon. *Mejia v. Ashcroft*, 298 F.3d 873, 877 (9th Cir. 2002) (holding that "if an informer against the NPA appears on a NPA hit list, he has a well-founded fear of persecution based on imputed political opinion"); *see also Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir. 1999) (en banc); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000).

5. Former Military Membership

To the extent that an applicant fears that he will be targeted as a current member of the military, this danger does not constitute persecution on account of political opinion or membership in a social group. *See Chanco v. INS*, 82 F.3d 298, 302-03 (9th Cir. 1996); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) ("Military enlistment in Central America does not create automatic asylum eligibility."). However, an applicant's status based on his former service could be the basis for a claim based on social group or imputed political opinion. *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000) (current police or military are not social group, though former police or military may be); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (ex-soldier who feared guerillas eligible for asylum because "persecutors identified [him] politically with the government [he] served").

6. Non-Governmental Conscription

A guerilla group's attempt to conscript an asylum seeker does not necessarily constitute persecution on account of political opinion. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)). In order to establish asylum eligibility, the applicant must show that the guerillas will persecute him because of his political opinion, or other protected ground, rather than merely because he refused to fight with them. *Id.* (holding that applicant was eligible for asylum because

the Separatists specifically targeted him for conscription based on his ethnicity and religion); *see also Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000); *Sebastian-Sebastien v. INS*, 195 F.3d 504, 509 (9th Cir. 1999); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992); *Maldonado-Cruz v. INS*, 883 F.2d 788 (1989) (pre *Elias-Zacarias*).

J. Exercise of Discretion

"If the applicant establishes statutory eligibility for asylum, the Attorney General must, by a proper exercise of [] discretion, determine whether to grant that relief." *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000); 8 U.S.C. § 1158(b). The BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Kazlauskas v. INS*, 46 F.3d 902, 907-08 (9th Cir. 1995); *see also Andriasian v. INS*, 180 F.3d 1033, 1043-47 (9th Cir. 1999) (temporary stay in a third country).

The Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999).

If asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

K. Bars to Asylum

1. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States. *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); 8 U.S.C. § 1158(a)(2)(B). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. *Hakeem*, 273 F.3d at 815.

a. Exception

If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(5). However, the court lacks jurisdiction over the BIA's determination that no extraordinary circumstances excused the untimely filing of the application. *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (citing 8 U.S.C. § 1158(a)(3)).

2. Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred. 8 U.S.C. § 1158(a)(2)(C). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

3. Safe Third Country Bar

An applicant has no right to apply for asylum if he or she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

4. Firm Resettlement Bar

An applicant is not eligible for asylum if he or she has been firmly resettled within the meaning of 8 C.F.R. § 1208.15. *See* 8 U.S.C. § 1158 (b)(2)(A)(vi); *Andriasian v. INS*, 180 F.3d 1033, 1043-47 (9th Cir. 1999) (applicant not firmly resettled); *Cheo v. INS*, 162 F.3d 1227, 1230 (9th Cir. 1998) (applicants failed to rebut inference of firm resettlement based on three year stay in Malaysia); *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998) (applicant

ineligible based on firm resettlement of parents); *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996).

5. Persecution-of-Others Bar

A person who "ordered, incited, assisted, or otherwise participated in the persecution" of any person on account of one of the five grounds may not be granted asylum. 8 U.S.C. § 1158(b)(2)(A)(i); *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985) (insufficient evidence that applicant assisted or participated in persecution of others based on political beliefs).

6. Particularly-Serious-Crime Bar

An applicant in removal proceedings is barred from relief if, "having been convicted by a final judgment of a particularly serious crime, [he] constitutes a danger to the community in the United States." *See* 8 U.S.C. § 1158(b)(2)(A)(ii); *see also Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) (noting that this statutory provision applies to immigration proceedings commenced on or after April 1, 1997). A person convicted of a particularly serious crime is considered per se to be a danger to the community. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (upholding BIA's decision not to balance the seriousness of the offense against the degree of persecution feared); *see also Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) (noting that the bar "is based on the reasonable determination that persons convicted of particularly serious crimes pose a danger to the community").

A person convicted of an aggravated felony "shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

If an applicant pleaded guilty to the crime before October 1, 1990, the bar to asylum in 8 C.F.R. § 1208.13(c)(2)(i)(A) cannot be applied to categorically deny relief. *See Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003). Instead, the conviction may be considered in the exercise of discretion. *Id.*

7. Serious Non-Political Crime Bar

An applicant is barred from relief if there are serious reasons for believing that he or she committed a serious, non-political crime outside the United States prior to arrival. 8 U.S.C. § 1158(b)(2)(A)(iii); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986) ("serious reasons for believing" means probable cause). The IJ is not required to balance the seriousness of the offense against the degree of persecution feared. *See INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

8. Security Bar

An applicant is barred from relief if there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv).

9. Terrorism Bar

Those who have engaged in terrorism, or where that are reasonable grounds to believe are engaged in or likely to engage in terrorist activity, are not eligible for relief. 8 U.S.C. § 1158(b)(2)(A)(v). Pursuant to 8 U.S.C. § 1158(b)(2)(D), this court lacks jurisdiction to review the IJ's determination under this section.

II WITHHOLDING OF REMOVAL

An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3) as well. *See* 8 C.F.R. § 1208.3(b); *Ghadessi v. INS*, 797 F.2d 804, 804 n.1 (9th Cir. 1986). Where deportation or exclusion proceedings commenced before April 1, 1997, withholding of deportation was available under 8 U.S.C. § 1253(h). Withholding codifies the international norm of "nonrefoulement" or non-return to a country where an applicant would face persecution. *See Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc).

In order to qualify for withholding of removal, an applicant must show that her "life or freedom would be threatened" if she is returned to her

homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3).

A. Eligibility for Withholding

1. Higher Burden of Proof

"To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation omitted). "This clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum." *Id.* at 888-89. (internal quotations and citation omitted).

An applicant who is not eligible for asylum necessarily fails to satisfy the more stringent standard for withholding of removal. *See Li v. Ashcroft*, 312 F.3d 1094, 1099 (9th Cir. 2002), *reh'g en banc granted*, (9th Cir. July 7, 2003). However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

2. Mandatory Relief

"Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the same protected grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotations and citation omitted).

3. Nature of Relief

Under asylum, an applicant granted relief may apply for permanent residence after one year. Under withholding, the successful applicant is only given a right not to be removed to a specific country. *See INS v. Aguirre-Aguirre,* 526 U.S. 415, 419-20 (1999).

4. Past Persecution

Past persecution generates a presumption of eligibility for withholding of removal. *See Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999); *Korablina v. INS*, 158 F.3d 1038, 1046 (9th Cir. 1998). Unlike asylum, however, past persecution is not a separate basis for withholding eligibility. An applicant can only show eligibility by demonstrating a likelihood of future persecution. *See e.g.*, *Ladha v. INS*, 215 F.3d 889, 902 (9th Cir. 2000).

5. Entitled to Withholding

Wang v. Ashcroft, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003); *Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (applicant and family suffered severe harassment, threats, violence and discrimination); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002) (applicant received multiple death threats at home and business, was "closely confronted" and actively chased); *Cardenas v. INS*, 294 F.3d 1062 (9th Cir. 2002) (threats by Shining Path guerrillas); *Rios v. Ashcroft*, 287 F.3d 895, 902-03 (9th Cir. 2002) (kidnapped and wounded by guerrillas, husband and brother killed); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074-75 (death threats combined with harm to family and murders of his counterparts), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (applicant was harassed, fired, interrogated, threatened, assaulted and arrested); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (kidnapped, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (arrested, tortured, and scarred); *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000) (past sentence and would face treason trial if returned); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of religious minority who engaged in prohibited interfaith commingling); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexian police); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (summoned for interrogation based on effort to translate and distribute banned book); *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000) (husband killed, applicant and family threatened); *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999); *Duarte de Guinac v. INS*, 179 F.3d 1156

(9th Cir. 1999) (applicant beaten harassed and threatened with death by military); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc); *Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999) (death threats); *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998) (torture); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997), *as amended on denial of rehearing*, 133 F.3d 726 (9th Cir. 1998); *Korablina v. INS*, 158 F.3d 1038, 1045-46 (9th Cir. 1998) (past discrimination, harassment and violence); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996); *Montoya-Ulloa v. INS*, 79 F.3d 930, 932 (9th Cir. 1996) (harassed, threatened, beaten, placed on "black list"); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996); *Singh v. Ilchert*, 69 F.3d 375, 380-81 (9th Cir. 1995) (per curiam); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (applicant threatened and close colleagues persecuted); *Mendoza Perez v. INS*, 902 F.2d 760, 763-64 (9th Cir. 1990); *Ramirez Rivas v. INS*, 899 F.2d 864, 872-73 (9th Cir. 1990) (death squads killed many family members and a close friend).

6. Not Entitled to Withholding

Hoxha v. Ashcroft, 319 F.3d 1179 (9th Cir. 2003); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (given changes in Romania since departure); *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000); *Barraza Rivera v. INS*, 913 F.2d 1443, 1454 (9th Cir. 1990); *Arteaga v. INS*, 836 F.2d 1227, 1231 n.6 (9th Cir. 1988) (one-time threat of conscription sufficient for asylum, but not for withholding); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985) (no specific threat, and government unaware of his protest activities).

B. Bars to Withholding

1. Nazis

Those who assisted in Nazi persecution or engaged in genocide are barred from withholding. 8 U.S.C. § 1231(b)(3)(B).

2. Persecution-of-Others Bar

Withholding is not available if the applicant "ordered, incited, assisted, or otherwise participated in the persecution of an individual" on account of the protected grounds. 8 U.S.C. § 1231(b)(3)(B)(i).

3. Particularly Serious Crime Bar

Withholding is not available if the applicant, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii). This bar is more narrowly defined than the bar in the asylum context because not all aggravated felonies are considered to be particularly serious. For cases filed on or after April 1, 1997, an aggravated felony conviction is considered to be a particularly serious crime if the applicant has been sentenced to an aggregate term of imprisonment of at least five years. *See id.*

The Attorney General has "discretion, pursuant to Section 1231(b)(3)(B)(ii), 'to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime.'" *Matsuk v. INS,* 247 F.3d 999, 1002 (9th Cir. 2001). This court lacks jurisdiction to review this discretionary finding under 8 U.S.C. § 1252(a)(2)(B)(ii). *Id*. (leaving open the question of whether the court would have jurisdiction over a non-discretionary denial of withholding). For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

4. Serious Non-Political Crime Bar

Withholding is not available if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before" arrival. 8 U.S.C. § 1231(b)(3)(B)(iii); *see also McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986) (holding that applicant was ineligible for withholding because he facilitated or assisted terrorists to commit serious non-political crimes).

5. Security and Terrorist Bar

Withholding is not available if "there are reasonable grounds to believe that the alien is a danger to the security of the United States," including applicants who have engaged in any terrorist activity. 8 U.S.C. § 1231(b)(3)(B)(iv). This bar is more limited than the security bar in the asylum context because it is more narrowly confined to persons who actually have or are engaged in terrorist activities.

III CONVENTION AGAINST TORTURE

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits states from returning anyone to another state where he or she may be tortured. *See Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) ("Article 3 provides that a signatory nation will not expel, return ... or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.") (internal quotations omitted).

The implementing regulations for the Convention are found in 8 C.F.R. § 1208.16 to 1208.18.

A. Standard of Review

This court reviews for substantial evidence the factual findings underlying the BIA's determination that an applicant is not eligible for relief under the Convention Against Torture. *See Zheng v. Ashcroft*, 2003 WL 21397687 (9th Cir. June 18, 2003). The BIA's interpretation of purely legal questions is reviewed de novo. *See id.*

B. Definition of Torture

"Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of

or with the consent or acquiescence of a public official or other person acting in an official capacity." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2002)). "'Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.'" *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2) "'Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'" *Id.* (quoting 8 C.F.R. § 208.18(a)(3) (2002)).

C. Burden of Proof

In order to be eligible for withholding of removal under the Convention Against Torture, the petitioner has the burden of proof "'to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(2)). "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Id.* at 1282 (quoting 8 C.F.R. § 208.16(c)(2)). A "petitioner carries this burden whenever he or she presents evidence establishing 'substantial grounds for believing that he [or she] would be in danger of being subjected to torture' in the country of removal" *Id.* at 1284.

D. Country Conditions Evidence

"[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1283 (9th Cir. 2001) (holding that a negative credibility finding in asylum claim does not preclude relief under the Convention, especially where documented country conditions information corroborated the "widespread practice of torture against Tamil males"). "[A]ll evidence relevant to the possibility of future torture shall be considered, including, but not limited to . . . [e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant information regarding conditions in the country of removal." *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (emphasis deleted)); *see also Abassi v. INS*, 305 F.3d 1028, 1029 (9th Cir. 2002) (holding that the BIA must consider the most recent State Department country conditions report where a pro se

applicant refers to the report in his moving papers); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that the BIA was required to consider relevant information in the State Department report).

E. Past Torture

Evidence of past torture is relevant to a determination of eligibility for relief. *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3)). However, unlike asylum, past torture does not provide a separate basis for eligibility.

F. Internal Relocation

"Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured" is relevant to the possibility of future torture. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3)).

G. Differences From Asylum and Withholding

"[T]he Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country." *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001).

H. Agent or Source of Torture

To qualify for relief under the Convention, the torture must be "inflicted by or at the instigation of or with the consent or *acquiescence* of a public official or other person acting in an official capacity." *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1)) (internal quotations omitted). "Acquiescence" by government officials does not require actual knowledge or willful acceptance; awareness and willful blindness by governmental officials is sufficient. *See id.* (granting

Convention relief to applicant who feared being killed by the smugglers who brought him to the United States).

I. Mandatory Relief

The non-return provision is absolute, and unlike asylum and withholding, there are no mandatory bars. *See* 8 C.F.R. § 1208.16(c)(4) (stating that deferral of removal under 8 C.F.R. § 208.17(a) is available for applicants who would otherwise be barred from withholding of removal).

J. Nature of Relief

Unlike asylum, Convention relief does not confer a status on an eligible applicant, only a protection from return to the country where the applicant would be tortured. 8 C.F.R. § 1208.16(f).

K. Cases Finding Torture

Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (repeated beatings and cigarette burns constitute torture).

L. Cases Not Finding Torture

Li v. Ashcroft, 312 F.3d 1094, 1103 (9th Cir. 2002) (involuntary pregnancy examination is not torture), *reh'g en banc granted*, (9th Cir. July 7, 2003); *Cano-Merida v. INS*, 311 F.3d 960, 965-66 (9th Cir. 2002) (affirming BIA's denial of motion to reopen to present Convention claim based on fear of return to Guatemala); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention and interrogation do not amount to torture).

M. Exhaustion

This court will not address a Convention claim unless it was first raised before the BIA. *See Ortiz v. INS*, 179 F.3d 1148, 1152-53 (9th Cir. 1999) (granting a stay of the mandate to allow the applicants to move the BIA to reopen to apply for relief). The proper procedure is for the applicant to file a motion to reopen with the BIA to apply for protection. *See*

Khourassany v. INS, 208 F.3d 1096, 1100, 1101 (9th Cir. 2000) (denying applicant's motion to remand his case; staying the mandate to allow applicant to file motion to reopen with the BIA).

IV SCOPE AND STANDARD OF REVIEW

A. Scope of Review

"Where . . . the BIA reviews the IJ's decision de novo, our review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Shah v. INS*, 220 F.3d 1062, 1067 (9th Cir. 2000) (internal quotations omitted). "Where . . . the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's." *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002). "If, however, the BIA reviews the IJ's decision for an abuse of discretion, we review the IJ's decision." *De Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997).

This court's review is limited to the information in the administrative record. *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996 (en banc); *but see Lising v. INS*, 124 F.3d 996 (9th Cir. 1997) (holding that this court is not precluded from taking judicial notice of an agency's own records).

"[T]his court cannot affirm the BIA on a ground upon which it did not rely." *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000).

B. Standard of Review

The BIA's factual findings are reviewed under the substantial evidence standard. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999). Factual findings will be sustained if they are "supported by reasonable, substantial, and probative evidence in the record." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003). Questions of law are reviewed de novo. *Id*. This court may grant a petition for review only if the evidence presented by the applicant is such that a reasonable fact-finder would have to conclude that the requisite fear of persecution existed. *See Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000); *see also Ghebllawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994) ("The Board's findings are entitled to respect; but they must

nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.").

C. Boilerplate Decisions

"[W]e do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) (quoting *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991)). The BIA's decision "must contain a statement of its reasons for denying the petitioner relief adequate for us to conduct our review." *Id*. However, this court will not impose "unnecessarily burdensome or technical requirements." *Id*. As long as the BIA provides "a comprehensible reason for its decision sufficient for us to conduct our review and to be assured that the petitioner's case received individualized attention," remand will not be required. *Id*.

V CREDIBILITY DETERMINATIONS

A. Standard of Review

Adverse credibility findings are reviewed under the substantial evidence standard. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

Deference is given to the IJ's credibility determination, because the IJ is in the best position to assess the trustworthiness of the applicant's testimony. *See Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003); *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985).

"While the substantial evidence standard demands deference to the IJ, we do not accept blindly an IJ's conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion and determine whether the reasoning employed by the IJ is fatally flawed." *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002) (internal quotations omitted).

An IJ must articulate a legitimate basis to question the applicant's credibility, and must offer specific and cogent reasons for any stated disbelief. *Id.* "Any such reason must be substantial and bear a legitimate nexus to the finding." *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (internal quotations omitted). "Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner's testimony" are insufficient. *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1997).

The IJ or BIA must explain "the significance of the discrepancy or point[] to the petitioner's obvious evasiveness when asked about it." *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000); *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003) (BIA failed to clarify why purported discrepancy was significant). Additionally, this court has reversed negative credibility findings where neither the IJ nor the BIA addressed the applicant's explanation for the identified discrepancy. *See Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001).

B. Credibility Factors

1. Demeanor

Credibility determinations that are based on an applicant's demeanor are given "special deference." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (deferring the IJ's observation that the applicant "began to literally jump around in his seat and to squirm rather uncomfortably while testifying" on cross examination). However, boilerplate demeanor findings are not appropriate. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051-52 (9th Cir. 2002) ("Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases.").

2. Responsiveness

"To support an adverse credibility determination based on unresponsiveness, the BIA must identify particular instances in the record where the petitioner refused to answer questions asked of him." *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002); *see also Garrovillas v. INS*, 156 F.3d 1010, 1014-15 (9th Cir. 1997).

3. Specificity and Detail

The level of specificity in an applicant's testimony is an appropriate consideration. *See Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (approving IJ's finding that an applicant's testimony was suspicious given its lack of specificity); *cf Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (finding testimony to be sufficiently detailed and specific).

4. Consistency

"Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding." *Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *see also Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) ("Any alleged inconsistencies in dates that reveal nothing about a petitioner's credibility cannot form the basis of an adverse credibility finding."). "[I]nconsistencies of less than substantial importance for which a plausible explanation is offered" also cannot serve as the sole basis for a negative credibility finding. *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998).

Discrepancies that cannot be viewed as attempts to enhance claims of persecution have no bearing on credibility. *Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

Apparent inconsistencies based on faulty or unreliable translations may not be sufficient to support a negative credibility finding. *See He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) ("[W]e have long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier."); *Singh v. INS*, 292 F.3d 1017, 1021-23 (9th Cir. 2002) (holding that perceived inconsistencies between applicant's airport interview and testimony did not constitute a valid ground for an adverse credibility determination, especially given the lack of an interpreter who spoke applicant's language). Discrepancies "capable of being attributed to a

typographical or clerical error . . . cannot form the basis of an adverse credibility finding." *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

Substantial inconsistencies, however, damage a claim and support a negative credibility finding. *See e.g., Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (relating to "the events leading up to his departure and the number of times he was arrested"); *de Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (inconsistency relating to the basis for the alleged fear).

5. Omissions

"[T]he mere omission of details is insufficient to uphold an adverse credibility finding." *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000). For example, an omission of one detail included in an applicant's oral testimony does not make a supporting document inconsistent or incompatible. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (doctor's letter failed to mention all of the applicant's injuries). Where an applicant gives one account of persecution but then revises the story "so as to lessen the degree of persecution he experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding." *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (internal quotation omitted); *see also Garrovillas v. INS*, 156 F.3d 1010, 1013-14 (9th Cir. 1997).

6. Timing

An applicant's failure to relate details about sexual assault or abuse at the first opportunity "cannot reasonably be characterized as an inconsistency." *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052-53 (9th Cir. 2002). An applicant persecuted by her government may be reluctant to reveal such information during her first meeting with government officials in this country. *Id.; see also Singh v. INS*, 292 F.3d 1017, 1023-24 (9th Cir. 2002). "That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying." *Paramasamy*, 295 F.3d at 1053.

7. Incomplete Asylum Application

"It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application." *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996); *see also Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport). *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (failure to mention two collateral incidents involving relatives on application not sufficient).

8. State Department Reports

It is improper for the BIA to rely "on a factually unsupported assertion in a State Department report to deem [an applicant] not credible." *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000); *cf. Chebchoub v. INS*, 257 F.3d 1038, 1043-44 (9th Cir. 2001) (IJ or BIA may place supplemental reliance on State Department report to discredit portions of testimony).

9. Classified Information

If the IJ makes an adverse credibility determination on the basis of classified evidence, such evidence must be produced before this court. *Singh v. INS*, 328 F.3d 1205, 1206 (9th Cir. 2003) (order).

10. Speculation and Conjecture

"Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000); *see also Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ's hypothesis as to what motivated the applicant's departure); *Singh v. INS*, 292 F.3d 1017, 1023-24 (9th Cir. 2002) (assumption regarding police motives); *Gui v. INS*, 280 F.3d 1217, 1226 (9th Cir. 2002) (IJ's opinion "as to how best to silence a dissident" not a legitimate basis); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (rejecting BIA's unsupported assumptions regarding the plausibility of applicant's political activities); *Bandari v. INS*, 227 F.3d 1160, 1167-68 (9th Cir. 2000) ("IJ's subjective view of what a persecuted person would include in his asylum application," personal belief that applicant should have bled when he was flogged, and speculation about a foreign

government's educational policies); *Shah v. INS*, 220 F.3d 1062, 1069, 1071 (9th Cir. 2000) (State Department conjecture about the effect electoral victory would have on existing political persecution, BIA's belief about what a letter should look like, and how many the applicant should have received); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

11. Counterfeit Documents

Use of counterfeit documents is not a legitimate basis for a negative credibility finding if the evidence does not go the heart of the asylum claim. *See Akinmade v. INS*, 196 F.3d 951, 955-56 (9th Cir. 1999) (use of false passport and false declaration that he was a Canadian citizen supported claim of persecution); *but see Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000) (noting contradictions between testimony and doctor's letter).

12. Previous Misrepresentations

"Untrue statements by themselves are not reason for refusal of refugee status." *Turcios v. INS*, 812 F.2d 1396, 1400-01 (9th Cir. 1987) (holding that Salvadoran applicant's false claim to INS officials that he was Mexican did not undermine his credibility). These statements must be examined in light of all of the circumstances of the case. *Id.; see also Al-Harbi v. INS*, 242 F.3d 882, 889-90 (9th Cir. 2001) (affirming negative credibility finding based on applicant's "propensity to change his story regarding incidents of past persecution"); *Aguilara-Cota v. INS*, 914 F.2d 1375, 1382 n.7 (9th Cir. 1990); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985) (negative credibility based on applicant's lies to get passport, and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting aliens in the United States).

C. Presumption of Credibility

Where BIA does not make an adverse credibility finding, this court accepts factual contentions as true. *See Navas v. INS*, 217 F.3d 646, 652, n.3 (9th Cir. 2000); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989) ("The BIA's refusal to consider credibility leads to the presumption that it found the petitioner credible").

D. Implied Credibility Findings

This court does not permit implicit adverse credibility determinations by an immigration judge. *See Shoafera v. INS*, 228 F.3d 1070, 1075 n.3 (9th Cir. 2000) (and cases cited therein); *Manimbao v. Ashcroft*, 329 F.3d 655, 658-59 (9th Cir. 2003) ("implicit credibility observations in passing" do not constitute credibility findings); *see also* section on Notice, below; *cf. Sebastian-Sebastian v. INS*, 195 F.3d 504 (9th Cir. 1999) (Wiggins, J., concurring) (giving deference to the IJ's implied negative credibility finding).

When the BIA finds that an applicant's testimony is "implausible," but does not make an explicit credibility finding of its own, this court treats the implausibility finding as an adverse credibility determination. *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000)

E. Sua Sponte Credibility Determinations and Notice

The BIA may not make an adverse credibility determination in the first instance unless the applicant is afforded certain due process protections. *See Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003). In *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), this court held that the BIA violated due process by sua sponte reversing an IJ's favorable credibility finding, *see also Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (remanding to allow the applicant to explain issues raised in BIA's sua sponte negative credibility finding). In *Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000), this court extended the logic of *Campos-Sanchez* to include cases where the IJ fails to make a credibility finding, *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000). In *Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003), the court found a due process violation where the IJ made a credibility observation, but failed to make an express credibility determination.

Where credibility is determinative, the BIA should remand to the IJ to make a legally sufficient credibility determination, or provide the applicant with specific notice that his credibility is at issue, and an opportunity to respond. *See Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003).

Where the IJ makes an adverse credibility determination and the BIA affirms that determination, but for different reasons, there is no due process

violation because the applicant was on notice that her credibility was at issue. *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000).

Where an applicant had no notice that a negative credibility finding could be based on his failure to call his father as a witness, due process required a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).

F. Remand

When this court reverses the BIA's adverse credibility determination, it must ordinarily remand an asylum case so that the BIA can determine whether the applicant has met the other criteria for eligibility. *See He v. Ashcroft*, 328 F.3d 593, 603-04 (9th Cir. 2003) (citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)). However, if credibility is the only issue, remand may not be necessary. *See id*. (holding that applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003) (same).

G. Cases Reversing Negative Credibility Findings

Wang v. Ashcroft, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003) (immaterial inconsistencies between two witnesses); *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003) (BIA failed to identify why purported inconsistency was significant); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (IJ misstated the evidence; other perceived problems explained); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (minor omission in doctor's note; trivial inconsistency regarding location of rally; no examples of unresponsiveness); *Gui v. INS*, 280 F.3d 1217, 1225-28 (9th Cir. 2002) (based on mischaracterizations of testimony, speculation, and disbelief); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (rejecting boilerplate negative credibility finding); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (holding that an adverse credibility finding was not supported by substantial evidence where neither the IJ or the BIA addressed the applicant's explanation for the identified discrepancy); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (implausibility finding based on impermissible grounds); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000); *Zahedi v. INS*, 222 F.3d 1157

(9th Cir. 2000); *Shah v. INS*, 220 F.3d 1062, 1067-71 (9th Cir. 2000); *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000) (based on explainable inconsistencies and IJ's cultural assumptions); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999); *Osorio v. INS*, 99 F.3d 928, 931-32 (9th Cir. 1996); *Mosa v. Rogers*, 89 F.3d 601, 604-05 (9th Cir. 1996); *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (based on circular reasoning); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994) (remanding for credibility finding); *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) ("failure to file an application form that was as complete as might be desired," and failure to present copy of threatening note, not a basis for negative credibility); *Vilorio-Lopez v. INS*, 852 F.2d 1137 (9th Cir. 1988) (minor inconsistency between testimony of two witnesses regarding year of death squad incident); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987) (discrepancy as to date father was killed); *Turcios v. INS*, 821 F.2d 1396, 1399-1401 (9th Cir. 1987); *Plateros-Cortez v. INS*, 804 F.2d 1127, 1131 (9th Cir. 1986) (uncertainty regarding dates, inconsistency regarding place and manner of employer's death); *Martinez-Sanchez v. INS*, 794 F.2d 1396 (9th Cir. 1986) (trivial date error, application listed two children, he testified that he had four); *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (concluding that failure to marry mother of children and discrepancy between application and testimony on birthdates of petitioner's children could not form a proper basis for an adverse credibility finding); *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985) (out-of-wedlock child is impermissible factor); *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984).

H. Cases Upholding Negative Credibility Findings

Malhi v. INS, 336 F.3d 989 (9th Cir. 2003) (geographic discrepancies going to heart of the claim); *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003) ("last-minute, uncorroborated story" regarding dramatic attack and stabbing); *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (material differences in two asylum applications regarding the basis of applicant's fear); *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001) (inconsistent statements about number of arrests, implausibility of other testimony); *Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000) (testified to attempted rape only in passing); *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000) (contradictions between testimony and doctor's letter); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999) (applicant jumped around during cross examination,

inconsistent testimony, sudden change in name to coincide with newspaper article); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997); *Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah's Witness); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992) (discrepancies between testimony and application regarding number of arrests and lack of detail); *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) (inconsistencies regarding identity of alleged persecutors); *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (substantial inconsistencies between application and testimony).

VI CORROBORATIVE EVIDENCE

A. Generally Not Required

"Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone." *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998) (internal quotations omitted). Accordingly, when an applicant presents credible testimony, "[n]o further corroboration is required." *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (internal quotation omitted) (applicant not required to produce evidence of organizational membership, political fliers or medical records).

B. Exception

However, "where the IJ has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review." *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000); *see also Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah's Witness).

1. Easily Available Evidence

Corroborative documentation may not be "easily available" where the applicant fled his or her country in haste, or where it would be dangerous to

be caught with material evidence. *See Salaam*, 229 F.3d at 1239; *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). "[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States--such corroboration is almost never easily available." *Sidhu v. INS*, 220 F.3d 1085, 1091-92 (9th Cir. 2000). However, affidavits from close relatives in Western Europe and from individuals in the United States should be "easily available." *Chebchoub v. INS*, 257 F.3d 1038, 1044-45 (9th Cir. 2001).

C. Cases Discussing Corroboration

See also Gui v. INS, 280 F.3d 1217, 1227 (9th Cir. 2002) ("Where, as here, a petitioner provides some corroborative evidence to strengthen his case, his failure to produce still more supporting evidence should not be held against him."); *Kataria v. INS*, 232 F.3d 1107, 1113-14 (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889, 900-01 (9th Cir. 2000) (thorough discussion of law of the circuit on corroborative evidence); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (corroborating letters or statements from mother in Guatemala and friend in Mexico not required).

D. Forms of Evidence

Corroborative evidence can take the form of documents, testimony of witnesses, expert testimony, and physical evidence, such as scars. *See Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (country conditions reports, witness testimony and scars); *Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (burn marks on arms and doctor's letter); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000) (expert testimony). *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (relying on persuasive expert testimony).

E. Country Conditions Evidence

Country conditions evidence generally provides the context for evaluating an applicant's credibility, rather than corroborating specifics of a claim. *See Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999); *but see Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (affirming BIA's use

of country reports to "refute a generalized statement, . . . not to discredit specific testimony regarding his individual experience.").

F. Certification of Records

Failure to certify foreign official records under 8 C.F.R. § 1287.6(b) is not a basis to exclude corroborating documents. *See Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001) (per curiam).

VII DUE PROCESS ISSUES

A. Right to a Full and Fair Hearing

The Fifth Amendment guarantees due process in deportation proceedings. *See Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999). An applicant for asylum is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). This court reviews de novo, and will reverse on due process grounds if the proceeding was "so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (internal quotation omitted).

B. Prejudice Requirement

In addition to showing a due process violation, an applicant must also show prejudice. *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002). Prejudice can be shown where "the IJ's conduct potentially affected the outcome of the proceedings." *Id*. (internal quotations and punctuation omitted). An applicant "need not explain exactly what evidence he would have presented in support of his application, and we may infer prejudice in the absence of any specific allegation as to what evidence [the applicant] would have presented." *Id*. (internal quotations and citation omitted); *see also Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000).

C. Exhaustion Requirement

Exhaustion is generally required. *See Ladha v. INS*, 215 F.3d 889, 903

(9th Cir. 2000). However, an applicant may raise a constitutional issue directly with the court of appeals, unless it is a due process claim which alleges a procedural error correctable by the BIA. *See Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995). Exhaustion is not required where it would be "futile or impossible." *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003).

D. Examples

1. Right to a Neutral Fact-Finder

This court has found a due process violation where the IJ pressured an asylum applicant to withdraw his application and to accept voluntary departure, without giving him an opportunity to present oral testimony at the hearing. *Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002); *see also Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (finding due process violation where "the IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel"); *Reyes-Melendez v. INS*, No. 02-70526, 2003 WL 22053448 (9th Cir. Sept. 4, 2003) (finding due process violation in suspension case where IJ was aggressive, snide, and accused applicant of moral impropriety); *cf. Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (rejecting due process claim based on the IJ's aggresive and harsh questioning).

2. Exclusion of Evidence

The IJ's exclusion of proffered evidence may result in a due process violation. *See Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (remanding for clarification of applicant's due process claims based on the exclusion of two documents).

3. New Country of Deportation

The IJ's last minute switch of the country of deportation violates due process because lack of proper notice. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

4. Right to Translation

"Due process requires that an applicant be given competent translation services" if he or she does not speak English. *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *see also Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000). "In order to make out a due process violation, . . . the alien must show that a better translation would have made a difference in the outcome of the hearing." *Kotasz v. INS*, 31 F.3d 847, 850 n.2 (9th Cir. 1994) (internal quotation omitted).

5. Right to File Brief

The BIA's refusal to allow an applicant to file a brief violated his due process rights. *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003).

6. Ineffective Assistance of Counsel

Due process claims based on ineffective assistance of counsel must generally comply with the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1071-72 (9th Cir. 2003). The applicant must: "(1) provide an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and afford counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why." *Id*. This court has held that noncompliance will be excused where the "facts are plain on the face of the administrative record." *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000).

For more information on ineffective assistance of counsel claims, *see* Motions to Reopen or Reconsider Immigration Proceedings.